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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 704

THE UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

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LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1930.

No.

THE UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, RESPONDENT.

Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE YOUR HONORS:

The Petition of the United States of America Ex Relatione Roy G. Barton respectfully shows to this Honorable Court that the Writ of Certiorari should issue for the following reasons:

I.

Questions Involved, and Reasons for Allowance of Writ of Certiorari.

That this action was originally brought in the Supreme Court of the District of Columbia on November 14, 1929, Law No. 77,386, to compel the Secretary of the Interior, by writ of mandamus, to issue an oil and gas prospecting permit, under the Act of February 25, 1920 (41 Stat. 437 et seq), to Roy G. Barton, who filed application for oil and gas respecting permit on June 10, 1928 (R. pp. 13-15).

The lands covered by Roy G. Barton's application had previously been included in an oil and gas prospecting permit,

which was canceled by the Secretary of the Interior, effective June 6, 1928 (R. pp. 6-7). At a drawing held on that date, in accordance with instructions from the Secretary of the Interior, said Roy G. Barton was found to be the successful applicant (R. pp. 4-5). Said application was duly transmitted to the Commissioner of the General Land Office for consideration and issuance of permit, but by letter of March 26, 1929, addressed to the Register, District Land Office, Las Cruces, New Mexico, which letter was approved by the respondent, the Commissioner of the General Land Office, rejected said application for permit on the ground that the respondent had ordered that "no oil and gas prospecting permits will be issued after March 12, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929 (R. pp. 7-9). Thereafter said Roy G. Barton appealed to respondent, and thereafter on September 4, 1929, decision was signed by the Assistant Secretary of the Interior, affirming the prior action of the respondent and denying said Roy G. Barton's right to the permit, on the ground that the rejection was in accordance with respondent's policy announced in Departmental Order No. 337 of March 16, 1929 (R. pp. 7-9).

(7) From the decisions of Mr. Justice Bailey and Mr. Justice Siddons of the Supreme Court of the District of Columbia, ordering writs of mandamus to issue against respondent, said respondent appealed.

Petitioner brought the action above referred to and the Supreme Court of the District of Columbia, on the 14th day of November, 1929, in which case Mr. Justice Jennings Bailey of the Supreme Court of the District of Columbia, in an opinion dated April 8, 1930, directed that a writ of mandamus issue against the respondent to reinstate the applications for permit and proceed therewith according to law. Said opinion held that respondent could not defeat the will of Congress by suspending the operations of the Leasing Act and the action of respondent did not constitute a withdrawal of public lands from the filing of applications for oil and gas prospecting permit under the Act of February 25, 1920 (R. pp. 20-22).

In the cases of W. B. Pyron and Ethel M. McLennan, and R. L. Paris *vs.* Ray Lyman Wilbur, the same respondent, Mr. Justice Siddons rendered an opinion in which he directed that the writ of mandamus issue against the respondent, to compel respondent among other things to reinstate application for permit and proceed therewith according to law, holding that respondent had no authority to suspend the execution, enforcement and administration, of a constitutional Act of Congress, to wit, the Act of February 25, 1920 (41 Stat. 437).

Under Section 35 of the Leasing Act, the public land states are entitled to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas in those states. Such money is to be used for the construction and maintenance of public roads, the support of public schools or public educational institutions as the various state legislatures may direct. They are also interested in taxes accruing from property used in the states in oil and gas operations and the relief from unemployment as a result of such operations; and in the development of the oil resources within the respective states.

The action of the Secretary in promulgating Orders No. 337 (R. pp. 7-9) and 338 (Exhibit "1"), in refusing to issue further oil and gas prospecting permits which may develop into leases, very vitally affects said public lands states by the elimination of royalties, taxes and employment, and delay in the development of the mineral resources of the particular states involved.

On such showing of a great public interest, the Court of Appeals allowed the States of New Mexico, Montana, Wyoming, Utah and Colorado to file briefs as amicus curiae and take part in the oral argument of these cases (R. pp. 24-25).

The above mentioned cases and several like cases were considered jointly in the Court of Appeals of the District of Columbia and on December 1, 1930, the Court rendered its decision reversing the decisions of Mr. Justice Bailey and Mr. Justice Siddons, and remanding the cause for further proceedings (R. p. 25), Mr. Justice Van Orsdel of said Court filed a dissenting opinion (R. p. 34).

II.

The importance of the questions involved in this case can not be overstated. They relate to questions of substance relating to the construction and application of Article 4, section 3, clause 2, of the Constitution of the United States of America, and of the Fifth Amendment of the Constitution, and to petitioner's right to property in the oil and gas prospecting permit, applied for which is the subject matter of this suit, and to a suspension of the Act of Congress, of February 25, 1920 (41 Stat. 437), by Orders Nos. 337 and 338, made by the Secretary of the Interior on March 16th and 20th, 1929. By said orders all pending applications for prospecting permits were rejected and all future applications were refused. They involve the authority of the Secretary of the Interior to override the Constitution of the United States and also to suspend an Act of Congress. Petitioner contends that he has no such authority either by the Constitution of the United States or the act involved or the regulations made under it.

The District Court of Appeals by its decision reversing the lower court held that the Secretary of the Interior could by promulgating Orders Nos. 337 and 338 suspend the operation of the aforesaid act of Congress of February 25, 1920, and refuse to receive, file and consider on their merits applications for oil and gas prospecting permits under said act, and in effect that such Orders could have a retroactive effect on previously acquired rights of the petitioner (R. p. 26).

III.

Another claim advanced in the argument of the case before the District Court of Appeals was that the Orders of the Secretary were in fact a withdrawal of the public lands involved, under the Act of June 25, 1910, U. S. C. A. Title 43; 36 Stat. 847-8. Petitioner contends that it was not the purpose of the Secretary to withdraw said lands under that Act, as the requirements of the Act were not complied with in any particular.

The Court of Appeals, by its decision, held that the Secretary of the Interior did withdraw the public lands of the

United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, by virtue of the power vested in the President of the United States to withdraw public lands from "settlement, location, sale or entry." (1) despite the fact that no report of such withdrawal under the Act of June 25, 1910, has been made to Congress under the terms of said act, and (2) that no proclamation, formal or otherwise, was ever issued by the President and no notice of any proclamation was given Congress by the Secretary as required by the Act of June 25, 1910 (R. p. 33).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of this Honorable Court directed to the Court of Appeals of the District of Columbia commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5241, Ray Lyman Wilbur, Secretary of the Interior, Appellant, *vs.* United States of America Ex Relatione Roy G. Barton, Appellee, and that said judgment of the Court of Appeals of the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as the nature of the case may admit and to this Honorable Court may seem meet and proper.

ROY G. BARTON,
By JAMES CONLON,
Of Counsel for Petitioner.

JAMES CONLON,
600 F St. N. W.,
Washington, D. C.
and
CHARLES F. BREEN,
Lawrenceville, Illinois,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, ss:

James Conlon, being first sworn, deposes and says, that he is Counsel for the petitioner and in the foregoing petition, that he has read same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information, and belief, and as to those matters he verily believes them to be true.

JAMES CONLON.

Subscribed and sworn to before me this 21st day of January, 1931.

JOHN R. FLETCHER,
Notary Public in and for the District of Columbia.

[NOTARIAL SEAL.]

My Commission expires February 23, 1932.

I hereby certify that I have examined the foregoing petition for certiorari, and that in my opinion it is well founded in point of law and should be granted by this Honorable Court, and that the petition is not filed for purposes of delay.

JAMES CONLON,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930

UNITED STATES OF AMERICA EX RELATIONE ROY G. BARTON, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, RESPONDENT.

Brief in Support of Petition for Certiorari.

---

1. The Opinions of the Court Below.

The opinion in the Court of Appeals of the District of Columbia was rendered December 1, 1930 (R. p. 24). The opinion of the Supreme Court of the District of Columbia was rendered on April 8, 1930 (R. p. 20).

2. Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. pp. 25-40).

This court has jurisdiction under section 240 (a), Judicial Code as amended by the act of February 13, 1925, U. S. C. Title 28, Sec. 347, 43 Stat. 938.

3. Statement of the Case and Reasons Why the Writ of Certiorari Should Issue.

The statement of the case and reasons why the Writ of Certiorari should issue have been set out in the annexed petition and in the interest of brevity is not repeated here.

4. Questions Presented.

The questions involved in this case is whether the Secretary of the Interior can under the Constitution of the United States make policies suspending a Constitutional Act of

Congress, and whether he can make his policies have retroactive effect so as to deprive a person of property in an oil permit application without due process of law, and without compensation, contrary to the Fifth Amendment to the Constitution of the United States, and whether he can make retroactive regulations, and whether under Section 13 of the Oil Leasing Act he can refuse an application for prospecting permit filed under that act, without cause, not because of any disqualification of the applicant; not because the lands are not subject to issuance of prospecting permit; but because of a policy adopted by him and not by Congress; or can the Secretary of the Interior suspend an act of Congress without legislative authority.

Another question has been discussed in the briefs and opinions, to wit: That the lands were withdrawn under the act of June 25, 1910, U. S. C. Title 43, Secs. 141-3 (36 Stat. 847-8). The answer to the petition in this case does not set up the question of withdrawals. The answer was based upon the exercise of discretion by the Secretary of the Interior which he claims to possess under Section 13 of the Oil Leasing Act of February 25, 1920 (41 Stat. 437 et seq).

As to the said Act of June 25, 1910 (36 Stat. 847-8), which was held by the majority opinion of the Court of Appeals of the District of Columbia to be in force in this case (Rec. p. 25) was a general statute relating mostly to the settlement of the public lands for other than oil purposes. (Exhibit "2"), and Congress in its wisdom recognized this when it passed the Oil Leasing Act of February 25, 1920 (41 Stat. 437), otherwise the aforesaid 1920 Act was not needed at all. It is a well recognized rule of statutory construction that a later statute on a specific subject like prospecting for oil takes precedence over a general statute on the same subject (if it is the same subject) it might be the same subject in a general way, but the 1920 Act on the oil leasing subject is controlling as far as it applies and comes in ahead of and takes precedence of the 1910 Act so that the 1910 Act if in conflict with the new later specific oil leasing statute of February 25, 1920

(41 Stat. 437), is by implication repealed. This is fundamental doctrine of statutory construction.

In Swiss Nat. Ins. Co. *vs.* Miller et al., 53 App. D. C. 173; 289 Fed. 571, affirmed in 267 U. S. 42, the Court held at 53 App. D. C. 176:

> "It is elementary that, where there is in an act a specific provision relating to a particular subject, that provision must govern in respect to the subject as against general provisions in other parts of the act, although the latter standing alone, would be broad enough to include the subject to which the more particular provision relates. Endlich Interpretation of Statutes" Swiss Nat. Ins. Co. *vs.* Miller, 53 App. D. C., supra at page 176. Affirmed 267 U. S. 42.

In Adams *vs.* Woods, 2 Cranch (U. S.) 336, 2 L. Ed. 297, Chief Justice Marshall speaking for this Court on the question of specific statutes restraining general statutes said:

> "It is true that general expressions may be restrained by subsequent particular words, which show that in the intention of the legislature those general expressions are used in a particular sense: and the argument is a strong one, which contends that the latter words describing the remedy, imply a restriction on those which precede them." Adams *vs.* Woods, 2 Cranch (U. S.) 336; 2 L. Ed. 297.

In Sedgwick on Statutory and Constitutional Law at page 423 it is said: "*General words how qualified by particular words:*

> "It is a rule of right reason that general words may be qualified by particular clauses of a statute, but that on the other hand a thing which is given in particular shall not be taken away by general words." Citing Churchill *vs.* Crease, 5 Bing. N. C. 180.

5. Assignment of Errors.

The Court of Appeals of the District of Columbia erred:

1. In reversing the decision of the Supreme Court of the District of Columbia.

2. In refusing to compel the respondent Secretary of the

Interior to reinstate petitioner's application for permit and proceed therewith according to law, and issue a permit thereon.

3. In holding that the respondent Secretary of the Interior has authority to suspend or dispense with the execution, administration and enforcement of the act of Congress of February 25, 1920 (41 Stat. 437).

4. In holding that the act of the respondent Secretary of the Interior was the act of the President, even though the Secretary acted without the scope of his authority.

5. In holding that the action of the respondent Secretary of the Interior was a withdrawal of public lands under the acts of Congress of June 25, 1910 (36 Stat. 847-848), even though the terms of said act were not complied with in that the President issued no formal proclamation and the Secretary of the Interior has not transmitted to Congress a report as to said withdrawals.

6. In holding that the Secretary of the Interior had authority to make rules and regulations having a retroactive effect on prior vested rights of applicant for Oil and Gas Prospecting Permit.

CONSTITUTIONAL QUESTIONS INVOLVED.

The Constitution of the United States, Article 4, Section 3 (2) provides that:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Petitioner contends that the Secretary of the Interior is arbitrarily usurping the function of Congress by suspending the Leasing Act of February 25, 1920, 41 Stat. 437, thus denying him the Oil and Gas Prospecting Permit which is the subject matter of this suit. In support of petitioner's contention that only Congress has the right to make the kind of rules and regulations suspending an Act of Congress and in support of petitioner's claim wherein the above provision

of the Constitution of the United States has been construed, petitioner cites the cases of United States *vs.* Gratiot, 14 Pet. 526, 536, 537; United States *vs.* Fitzgerald, 15 Pet. 407; Van Brocklin *vs.* Anderson, 117 U. S. 151, 158.

Under the above provision of the Constitution of the United States the public land policies are controlled by Congress and at no time in the administration of the public lands, either in the Constitution of the United States or in any of the laws passed by Congress was it left to the Department of the Interior to create policies or to ascertain disposition of lands other than by direct authority of Congress.

Petitioner further contends that the action of the respondent, Secretary of the Interior, is also in violation of petitioner's right under the Fifth Amendment to the Constitution of the United States which provides:

> "No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation."

In view of the above Constitutional mandates it is clear that it is the duty of the respondent Secretary of the Interior to faithfully execute the policy of Congress pertaining to the issuance of Oil and Gas Prospecting Permits under Section 13 of the Leasing Act of February 25, 1920 (41 Stat. 437), as has been done for a period of over nine years. The refusal of the respondent to issue the Oil and Gas Prospecting Permit to petitioner is a taking of petitioner's property in the permit lands without due process of law; that it was a taking of his property without compensation contrary to the due process clause of the United States Constitution (Rec. pp. 10-11). That "the denial of the permit to him on his permit application 038059 is a taking of his property . . . and is confiscatory and is in violation of his rights under the Constitution of the United States of America." (Rec. pp. 10-11).

In United States *vs.* Gratiot, 14 Pet., supra, at page 537, 10 L. Ed. 578, supra, the Court said:

"the Constitution of the United States (Article four, Section three) provides:

> 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.' The term 'territory' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.' And Congress has the same power over it as over all other property belonging to the United States; and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest. . . . The disposal must be left to the discretion of Congress. . . ."

In the case of United States *vs.* Fitzgerald, 15 Pet. 407, 10 L. Ed. 785, supra, the Court construed Article 4, Section 3 of the Constitution of the United States and affirmed the judgment of the lower Court in favor of the preemption homestead entryman Fitzgerald, and said at 15 Pet. 421; 10 L. Ed. 790:

> "No appropriation of public land can be made for any purpose but by authority of Congress. . . .
>
> This Honorable Court in Van Brocklin *vs.* Anderson, supra, at 29 L. Ed. 848, held that "The Constitution creating a more perfect union and increasing powers of the National Government, expressly authorized the Congress of the United States to" . . . "dispose of and make needful rules and regulations respecting the territory and other property belonging to the United States. . . ." Van Brocklin *vs.* Anderson, 117 U. S. 151; 29 L. Ed. 845."

ARGUMENT.

THE DISCRETION OF THE SECRETARY OF THE INTERIOR IS A QUASI-JUDICIAL DISCRETION AND IS LIMITED TO THE QUESTION OF CITIZENSHIP OF APPLICANT AND FORM OF APPLICATION.

Petitioner contends first that the Secretary has no discretion under the Constitution of the United States of America, or under the Oil Leasing Act to suspend said Oil Leasing Act; second, he possesses no such discretion under Circular 672 which is the regulation under said Act. The title of the Act is "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." From the title of the Act the policy is to promote the mining of minerals, above named, and not to discourage the mining of these minerals by suspending the operation of Section 13 of the Act.

By Section 1, deposits of oil and gas on the public domain, *shall* be subject to disposition in the form and manner provided by this Act to citizens of the United States. The lands *shall* be disposed of, a very mandatory expression, and there is no discretion left as to whether or not the Secretary desires to dispose of these lands, but it imposes on him a positive duty to dispose of them as provided in the Act.

Section 13 of the Act is as follows (R. pp. 2-11).

> "That the Secretary of the Interior is hereby *authorized*, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit." West *vs.* Alling, 58 App. D. C. 329.

It is apparent that the interpretation of Section 13, whether it is permissive or mandatory, hinges on the word "authorized." In interpreting Section 13 the entire act must be read in order to ascertain whether Congress intended the word "authorized" to mean merely permissive or mandatory upon the Secretary to issue prospecting permits.

Section 32 of the Act is as follows (R. p. 6):

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and *to do any and all things necessary to carry out and accomplish the purposes of this Act,*" etc. (Italics ours.)

It will be noted that the same word "authorized" which is used in Section 13 is also used in Section 32. If the word "authorized" is permissive and not mandatory in Section 13, then it is fair to assume that "authorized" in Section 32 is also permissive and not mandatory. Is it reasonable to suppose in construing Section 32, that Congress intended that the Secretary of the Interior may or may not prescribe the necessary rules and regulations, to do any and all things necessary to carry out and accomplish the purposes of this Act? Is it reasonable to assume that if the Secretary did not desire to prescribe any regulations to carry out the Act, he need not prescribe such regulations because the word "authorized", is interpreted by him to mean merely permissive and not mandatory? Is it reasonable to construe the word "authorized" as used in Section 32 as merely permissive and that in the place of the Secretary drawing up regulations in order to accomplish the purposes of the Act he may not do so because the word "authorized" as used in Section 32 is permissive and not mandatory? This is preposterous on the face of it. Therefore, it is fair to conclude that the word "authorized' as used in Section 32 is mandatory and not permissive. In other words, that the Secretary *shall and must* prescribe the necessary rules and regulations in order to carry out the purposes of the Act, and if the word "authorized" in Section 32 is mandatory, by no stretch of the imagination can we construe the word "authorized" in Section 13 to be permissive.

Considering the title of the Act which says its purpose is to "promote" the mining of oil and gas, Section 1, which states that the lands *shall* be subject to disposition in the form and manner provided by this Act, Section 13 which authorizes the Secretary of the Interior to issue prospecting

permits to qualified applicants, and Section 32 which authorizes the Secretary of the Interior to draw up the necessary rules and regulations in order to carry out the purposes of the Act as stated in its title and in its enacting clause, the inevitable conclusion is that the word "authorized" is mandatory and not permissive. It is true that the Secretary has a quasi-judicial, not an arbitrary, discretion to ascertain the qualifications of the applicant. These qualifications are set out in the Act. The applicant must be a citizen of the United States or an association of such persons, or a corporation organized under the laws of the United States or of any State or Territory thereof, or a municipality. The lands must not be in a producing structure of an oil or gas field. In ascertaining these qualifications, both as to persons and to the lands, the Secretary exercises a legal quasi-judicial and not an arbitrary discretion, but when this quasi-judicial discretion is exercised and he finds that the lands are not within a producing structure and that the applicant is qualified under the Act to receive a permit, his discretion ceases and a permit must issue on such application to carry out the purposes of the Act and the intent of Congress in passing it. We conclude therefore, from a study of all the pertinent clauses and sections of the Oil Leasing Act relating to these cases, that the Secretary of the Interior is compelled by law to issue permits to qualified applicants for lands not within a producing structure, and that the word "authorized" as used in Section 13 of the Act, is for all intents and purposes, mandatory and not permissive; and that such was the intent of Congress in its wisdom in passing said Leasing Act.

CIRCULAR NO. 672 (47 L. D. 437).

Circular No. 672 reported in (47 L. D. 437) is the Secretary of the Interior's regulation under the Oil Leasing Act, and the promulgation of which was authorized by Section 32 of the Act.

This circular contains among other instructions, the following paragraph:

> "It should be understood that under the Act the granting of a prospecting permit for oil and gas is dis-

> cretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirely, *as the facts may be deemed to warrant.*"

For over nine years the Department of the Interior had issued permits on applications without ever interpreting this paragraph as now interpreted. For over nine years it has been understood, and by its own action in refusing certain applications, the Department itself has invoked this paragraph by citing *facts* which prompted such rejection, as failure to show evidence of citizenship or because the lands were in a producing structure, or because the applicant applied for more acreage than he was allowed by law. Not until the present respondent Secretary of the Interior came into office has any other interpretation been given to this paragraph. Assuming, however, that the interpretation of this paragraph in circular No. 672 is a proper one, then Orders Nos. 337 and 338 are null and void because nowhere within the Act itself is the Secretary given the power to reject in whole or in part, an application for prospecting permit as he sees fit, and no regulation can amend or suspend or repeal an Act of Congress. His authority to draw up any regulation governing this Act is circumscribed by the language in Section 32, and it is inconceivable that Congress which spent nine years in considering legislation governing mining on the public domain before passing this Act, will permit anyone to destroy that legislation at will, which the Secretary has done by his Orders Nos. 337 and 338.

It is true, that he exercises a judicial or quasi-judicial discretion, as this paragraph in Circular No. 672 states, to reject in whole or in part an application for permit in individual cases "as the facts may be deemed to warrant." He is the official in whom authority is vested to determine whether or not an applicant for a permit is qualified under the law, in such matters as to determination of the citizenship of an applicant, and whether the applicant has made a sufficient application as to form for permit under the Act of Congress of February 25, 1920 (41 Stat. 437).

DEFINITION OF THE WORD "SHALL."

It is clear that the word "shall" as used in Paragraph 1 of the Oil and Gas Leasing Act of February 25, 1920 (41 Stat. 437), is mandatory and that Congress in its wisdom so intended that it should be mandatory and that it should be the duty of the Appellant, Secretary of the Interior, to issue oil and gas prospecting permits to qualified persons applying for same.

In Vol. 35 Cyc., page 1451, the word "shall" is defined as follows:

> "*SHALL.* In common parlance, a term which it is said, has always a compulsory meaning, and in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future; but it may be used in the preterit present sense of 'must,' of which it is a synonym. As used in statutes, the word is generally mandatory; although it is not always imperative but may be consistent with an exercise of discretion. Thus it may be construed to mean 'may' when no right or benefit to any one depends on its imperative use; when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction; or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government; and it also means 'may' when used by a legislature in a grant of authority to a court. It is often used in a remedial statute in a general sense including both past and future, and should be so considered when a more restricted interpretation is not required."

In Martin *vs.* Hunter's Lessee, 1 Wheat. (U. S.) 304, 329, Mr. Justice Story in delivering the opinion of the Court which gave the word *shall* a mandatory construction said:

That it was the opinion of the whole Court that the word *shall* as used in the third article of the Constitution of the United States is mandatory.

In connection with Section 13 of the Oil and Gas Leasing Act of February 25, 1920, it is clear that the word "authorize" when taken in connection with Section 1 and Section 32 of said Act, is mandatory and requires the Secretary of the Interior to consider Applications for oil and gas prospecting permits and that it does not allow him to reject applications without cause or on the strength of the policy adopted by him and not by Congress nor does Section 13 or Section 1 or Section 32 or any section of the Act of February 25, 1920, give the Secretary of the Interior the right to annul the provisions of the Act of February 25, 1920, by rejecting pending oil and gas applications for permits and thus suspending the operations of said Act of Congress.

In Volume 6, Corpus Juris, page 865, the word "authorize" is defined as follows:

> "*AUTHORIZE.* To empower; to give a right to act; to clothe with authority; to give legal power to; to approve of and formally sanction."

LAND DECISIONS.

Numerous land decisions maintain the contention of petitioner, that the Secretary does not have the discretion he claims and that these decisions recognize the *right*, not the *privilege* of an applicant who is qualified to take a permit for lands which are not in a producing structure.

In 48 Land Decisions, 98, are Instructions dated April 23, 1921, by the Secretary of the Interior.

Several applications for oil and gas permits were filed on the very first day or shortly after the passage of the said Act of February 25, 1920 (41 Stat. 437), in the State of Montana under Section 13 of the Oil Leasing Act. Because of the large number of applications involved, it took considerable time for the officials of the Land Office to consider these applications. When they finally were considered by the officials of the Land Office, it was found that the lands embraced in those applications were, since the filing of same, classified by the officials of the U. S. Geological Survey as being in what is known as the Cat Creek oil and gas produc-

ing structure. Accordingly, these applications were held for rejection because the lands were in a producing structure, and on appeal to the Secretary of the Interior, the rejection of these applications was sustained. On a Motion for Rehearing, however, the Secretary reviewed these decisions and in his instructions to the General Land Office stated as follows:

> . . . . "Applying the principle so announced, it is clear that not only equitably but legally, qualified persons who filed proper applications for oil or gas prospecting permits under the Act of February 25, 1920, *can and should not be deprived of their rights, if,* because of delay in action upon the application so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office." (48 L. D. 99).

This is a typical case which brings out several important points: 1. That the Secretary of the Interior recognized the right to a permit by a qualified applicant upon the filing of an application. 2. That such right is initiated at the time the application was filed and not at the time the application is considered by the officials of the General Land Office. 3. That this right is not affected by changes in the status of lands between the time the application was filed and the time that it may be considered by the officials of the General Land Office. 4. This decision clearly shows, coming as it does from the Secretary of the Interior, the kind of discretion granted him under Section 13 of the Oil Leasing Act, a discretion which he properly and judiciously used in the above quoted case: By this decision we see that the Department of the Interior has steadfastly recognized the right to an oil prospecting permit by a qualified applicant, and that the discretion given him by the Leasing Act refers only in so far as the qualifications of the applicant are concerned, and the nature of the lands involved.

Petitioner denies the authority to the respondent to make retroactive regulations, on the authority of 48 L. D. 99; supra, and of Westminster *vs.* Kline, 52 L. D. 481, wherein the Department held, at page 482, that its "instructions are not retroactive," Westminster *vs.* Kline, 52 L. D. 482.

As it is conceded by the pleadings that the petitioner filed his application for Oil and Gas Prospecting Permit which is the subject matter of this suit on June 6, 1928, (Rec. p. 13), which was more than nine months prior to the issuance of the respondent's Orders Nos. 337 and 338, it is respectfully submitted that petitioner is entitled to the permit applied for under the holding of the Interior Department in 48 L. D. 99, supra; and 52 L. D. 481, 482, supra. Other cases in support of this contention that respondent can not make retroactive rules are United States *vs.* MacDaniel, 7 Peter (U. S.) 1-14; James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597; and West *vs.* Alling, 58 App. D. C. 329, 30 Fed. (2d) 739.

In the case of United States *vs.* MacDaniel, 7 Pet. 1, 8 L. Ed. 587, the court, considering the broad powers of a department of the government to establish rules and regulations for the conduct of its business, when not in conflict with express provisions of law, said:

> "Hence, of necessity, usages have been established in every department of the government; which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a *retrospective effect, but must be limited to the future.* Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions." (Italics ours.) United States *vs.* MacDaniel, 7 Pet. 1-14, 8 L. Ed. 587.

In the case of James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597, supra, decided by Judge Sanborn, and by Circuit Judges Caldwell and Thayer, is a full and complete announcement of the law as to the power of the Secretary of the Interior to ignore existing regulations. Quoting from the syllabus, which epitomizes the law as announced in the opinion, the

court held that: "rules of practice of the Land Department formally established and promulgated by authority of the Secretary of the Interior, can be repealed or abrogated by like formal action and publication only. Decisions or opinions of the Secretary and the Commissioner in contests between claimants for specific tracts of land ignoring or violating rules neither repeal nor modify them:" James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597.

The case of West *vs.* U. S. ex rel. Alling, 58 App. D. C. 329, 30 Fed. (2d) 739, pertaining to the questions involved. The Court of Appeals of the District of Columbia held:

> "It will be observed that the Act in Section 1 expressly provides for the disposition of oil and gas land through prospecting permits and subsequent leasing 'to citizens of the United States'; and the power vested in the Secretary to establish rules and regulations for the carrying out of the Act does not imply the power to establish a rule or regulation that will conflict with an expressed provision of the Act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit or to make any rule or regulation that interferes with the right of such applicant." . . . And in this case of West *vs.* Alling, the Court added: "Unquestionably, the Secretary has no power to repeal and abrogate rules and regulations of his department, but such action must have the same formal sanction that brought the rule into existence, and can not be retroactive and apply to rights acquired under the preexisting rules." West *vs.* Alling, 58 App. D. C., 329, 332; 30 Fed. (2d) 739.

From the above language of this Honorable Court in U. S. *vs.* MacDaniel, 7 Pet. 1-14, and of the decision of the U. S. Circuit Court of Appeals, Eighth judicial circuit, in James *vs.* Germania Iron Co. (C. C. A.) 107 F. 597, and of the Court of Appeals of the District of Columbia, it will be noted that the Secretary is powerless to establish any regulation which conflicts with the expressed provision of the

Act or which are retroactive and that he has no discretion to issue or not to issue a permit to a qualified applicant. West *vs.* U. S. ex rel. Alling, supra.

WHEN PERMISSIVE WORDS ARE MANDATORY.

It has been and is well settled that even where permissive words are used, such as "may" in statutes conferring power upon public officers, without other language showing that it was intended to vest discretion, such words are to be construed as equivalent to "must" or "shall" where the statute imposes a public duty to be performed, or makes provisions for the benefit of individuals whose rights can not be effectuated without the exercise and performance of the power. Minor *vs.* Mechanics Bank, 1 Peters (U. S.) 47; Supervisors *vs.* United States, 4 Wallace (U. S.) 435.

In Supervisors *vs.* United States, *supra*, the language used in the Statute conferring authority to levy a tax to satisfy the indebtedness of the county was "may if deemed advisable." Notwithstanding the accompanying language, i. e., "if deemed advisable," it was held that the statute gave the bank the right to demand that the supervisors should exercise their powers to make a satisfaction of the indebtedness, the Court saying:

> "The conclusions to be deduced from the authorities is, that where power is given to public officers in the language of the Act before us, or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form is in fact peremptory. What they are empowered to do for a third person the law requires be done." . . .
>
> "In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion but to impose a positive and absolute duty." Supervisors *vs.* United States, 4 Wallace 435.

In Chase *vs.* United States, 261 Fed. 833 (8 C. C. A.) affirmed (256 U. S. 1), an Act providing for allotments to

the children of Omaha Tribe was in question. The Act stated:

> "That the Secretary of the Interior be and he is hereby *authorized* to cause to be surveyed . . . and after such survey and appraisements to sell and convey . . . all the unallotted Omaha Indian Reservation . . ."

The contention of the Secretary of the Interior in that case was that the word *authorized* allowed him to exercise discretion in determining whether or not the land should be surveyed and sold: the Court held:

> "An examination of the legislation of Congress shows that in many of the Acts of Congress the word 'authorized' is frequently used where the duty is imposed upon a public executive officer, *and in no case are the duties imposed discretionary unless, after the word 'authorized' the* other words, 'in his discretion,' are added."

In Lucas *vs.* Ensign, 4 N. Y. Leg. Obs. 142, it was held that the word "may" in a statute means "must" whenever third persons or the public have an interest in having the act done which is authorized by the use of such permissive language. Lucas *vs.* Ensign, 4 N. Y. Leg. Obs. 142. See also Editor's Note, 7 L. Ed. 47.

In the language of the Court in the Chase case, supra at page 837, it was held that a statute authorizing a public officer to do a thing imposed upon him a positive duty to do such thing which might be enforced by those for whose benefit it was to be done in the absence of words in the statute giving him discretion. Reference is there made to the case of Mason *vs.* Fearson, 9 How. 248, 258, 13 L. Ed. 130, and cases cited therein.

To the same effect are the following authorities:

Catron *vs.* Marron, 19 N. M. 200; and Springfield Milling Company *vs.* Lane County, 5 Ore. 271; and 2 Lewis Sutherland Statutory Construction, Section 636; and U. S. ex rel. Kreh *vs.* Ingham, 38 App. D. C. 379; and Cortelyou *vs.* Thorpe, 32 App. D. C. 20.

In Roberts *vs.* U. S. ex rel. Valentine, 176, U. S. 221, this Honorable Court held:

> "Unless the writ of mandamus is to become practically valueless and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, the writ should be granted. Roberts *vs.* U. S. ex rel. Valentine, 176 U. S. 221."

From an interpretation of Article 4, Section 3 (2) of the Constitution of the United States and of the Fifth Amendment of the United States Constitution, and from an interpretation of the Oil Leasing Act of February 25, 1920 (41 Stat. 437); and from an interpretation of Circular No. 672 which embodies the regulations of the Interior Department under this Leasing Act; from the Land Decisions promulgated in the Interior Department and from Court decisions, the Oil Leasing Act, and particularly Section 13 does not give the Secretary of the Interior the right to reject permit applications without cause or on the strength of a policy adopted by respondent and contrary to a policy adopted by Congress. The opinions of Justices Bailey and Siddons of the Supreme Court of the District of Columbia on the alleged authority of the Secretary to suspend the Act of February 25, 1920 (R. p. 20), are well founded and based on good sound reasoning and law as is also the dissenting opinion of Mr. Justice Van Orsdel of the Court of Appeals of the District of Columbia, in the case of Wilbur *vs.* Barton on the alleged authority of the respondent to suspend said Act of February 25, 1920 (41 Stat. 437), supra, (R. pp. 34-39).

WITHDRAWALS UNDER THE ACT OF JUNE 25, 1910 (36 Stat. 847-848).

If the Secretary does not possess the power he claims from the Oil Leasing Act itself, does he derive that power from other sources? As stated in the beginning, the question of withdrawal has no place in the consideration of this case; the question of withdrawal was not raised by respondent in his answer to the Petition in this case, but as the decision

herein complained of is based on an alleged withdrawal, it is deemed necessary to give it consideration here.

In the first place, no proclamation or withdrawal of any lands was issued by the President of the United States on March 12, 1929, or at any time since. The President did issue a statement through the press in which he stated, among other things that there will be complete conservation of Government oil in this administration. This certainly was not a legal withdrawal of lands for any purpose and it was not a proclamation bearing the signature of the President. If the President had issued a formal proclamation withdrawing *all* public lands from further filing for oil prospecting purposes, such action would not have been valid. The Constitution, Article 4, Section 3 (2), specifically provides that Congress is vested with the power to make rules respecting the public domain. However, no proclamation was ever issued withdrawing such lands. No proclamation having been issued, the Secretary is now relying on an alleged withdrawal under the Act of June 25, 1910, U. S. C. Title 43, Sections 141, 142 and 143, (36 Stat. 847-848), for convenience see copy of said Act attached hereto marked Exhibit "2," and as evidence of such withdrawals he submits a telegram of March 13, 1929, and Departmental Orders Nos. 337 and 338. This telegram was signed by Spry, the then Commissioner of the General Land Office, and approved by respondent. It is as follows:

> "No oil and gas prospecting permits will be issued on and after March Twelfth nineteen Twenty-nine Stop Reject all applications for oil and gas permits now pending in your office and receive no more Stop All orders for drawings hereby revoked"
>
> "SPRY
> *Commissioner*"
>
> "Approved:
> RAY LYMAN WILBUR
> *Secretary.*"

It is clear that this telegram is merely an instruction to the Register to reject all pending applications and refuse to

receive any further applications for permits. It does not *describe* any particular lands and does not cite any particular withdrawal. This telegram, therefore, in itself, could not be considered a withdrawal of lands. Now, if this telegram referred to is not a withdrawal, let us consider Orders Nos. 337 and 338 (R. p. 7). (Exhibit "1"). These Orders are, instructions to the Commissioner of the General Land Office and to the Registers of all local Land Offices to reject all applications then pending for oil and gas permits, and to refuse to receive any further permit applications. No withdrawal of lands made since the establishment of the Land Department was ever termed in the language of this telegram and these Orders. If a withdrawal of lands was contemplated, there is no valid reason why these Orders should not have stated that the lands were withdrawn, and give a description of the lands so withdrawn. The gist of these Orders shows clearly that the Secretary erroneously thought that he had authority despite the United States Constitution and the leasing Act of Congress to issue directions to his subordinate officers to suspend Section 13 of said Oil Leasing Act. The word "withdrawal" is not used in any of the three papers referred to, and neither are any words used from which we can infer a withdrawal of lands. These memoranda to the press which were later called Orders Nos. 337 and 338, were not withdrawals of public lands but was an arbitrary and capricious withdrawal by the Secretary from his subordinates of their power to carry into effect a Constitutional Statute enacted by Congress in its wisdom. Even an intimation of the possession of such authority by an administrative officer of the Government is unthinkable, and is diametrically opposed to American system of Government by law and not by men. Had certain described lands been withdrawn and had the lands here involved been included in such a withdrawal, then the effect of such withdrawal on the issuance of permits might form a subject of proper discussion, but a withdrawal which was never made and which as a matter of fact never had existence, certainly can not control a decision in this case at bar.

That the respondent Secretary of the Interior did not rely on any withdrawal having been made in order to sustain his action, is palpable from the decisions and published statements of the Department itself. In the decision quoted in full below in the R. L. Paris case, dated August 2, 1929, and identified in the Department as A-13784, the Secretary states:

"A-13784. August 2, 1920.

"R. L. PARIS. { "N" / Las Cruces 039906. / Permit application rejected. / Affirmed.

"Appeal From The General Land Office.

"R. L. Paris has appealed from a decision by the Commissioner of the General Land Office rejecting his oil and gas prospecting permit application, filed March 7, 1929, in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929.

"The issuance of prospecting permits for oil and gas is, under Sections 13 and 32 of the Leasing Act, discretionary with the Secretary of the Interior, and the regulations approved March 11, 1920, expressly so advise applicants. See *Joseph C. Sampson* (52 L. D.).

"The rejection of the application will not be disturbed and is hereby declared final."

It will be seen from this decision in the R. L. Paris case as well as in this Barton case at bar (R. pp. 6-7), that the reason respondent gives for the rejection of the application is not based on any withdrawal, but specifically states that under the Leasing Act and the regulations thereunder, the granting of a prospecting permit is discretionary with the Secretary of the Interior.

In another decision which was taken on appeal and identified in the Interior Department as A-13133 of Siegfried James Iverson, respondent used the exact words used in the R. L. Paris case quoted above. Not a word is mentioned about withdrawals. In the same decision the Secretary very clearly states, "the present case involves only the Leasing Act of February 25, 1920."

It is an established principle of construction that the intention of the parties creating a document such as a withdrawal, will govern the interpretation of the nature of that document, we find that by his own acts after the promulgation of Orders Nos. 337 and 338 which the majority opinion of the Court of Appeals now claims are withdrawals, the Secretary thought otherwise of them in his decisions on pending cases in the Department, for he cites the authority for issuing Orders Nos. 337 and 338 not a withdrawal of lands but the granting of discretion to him by the Act itself. Respondent has even gone further than his decision in showing his intention not to interpret these orders as withdrawals. In the Land Service Bulletins which are published monthly by the direction of the Secretary of the Interior, we find that among other things published in these Bulletins and official reports of respondent which are official, that prospecting permits have actually issued, and an additional 150 canceled oil and gas permits were reinstated, and 199 new new oil and gas prospecting permits issued, and 133 applications for oil and gas permits reinstated, making a total of 482 oil permits issued by the respondent since the issuance of Orders Nos. 337 and 338, according to respondent's report for 1930. Now, if these orders can be interpreted as withdrawals, as now claimed by appellant, how could he issue permits to some, and deny a permit to petitioner? True, he claims these cases to be exceptions inasmuch as the issuance of these permits was based on equities established by the applicants because they had submitted a geological report of the lands embraced in such applications which he claims are of benefit to the Government. But withdrawals do not recognize any exceptions except valid subsisting rights at the time the withdrawal is made, and counsel for respondent claims that the filing of an application is not a valid subsisting right, and therefore, no matter what geological reports have been filed by those who are fortunate enough to be favored by the Secretary with the issuance of permits ever since these alleged withdrawals were made, they have no greater rights than petitioner, and the Secretary was wholly

wrong in rejecting the application of petitioner or he was wholly wrong in issuing 482 oil prospecting permits to others since the issuance of Orders 337 and 338. If by these Orders the entire public domain which is believed to possess potential petroleum value, has been withdrawn, as must be the case if *any* of said lands have been so withdrawn, then none of said lands have been open to issuance of oil prospecting permits because withdrawn lands are not subject to acquisition. By the fact that the Department has issued at least 482 such permits since Orders Nos. 337 and 338 were issued proves conclusively that its action denying a permit to petitioner was not based on a question of withdrawal but on the wrongful exercise of a discretion which the Secretary erroneously thought he possessed under the Oil Leasing Act itself. Therefore, the inevitable conclusion is that no withdrawals exist of public lands as held by the majority opinion of the District Court of Appeals and the case must stand or fall on the discretion granted to him under the Act itself.

Assuming that the telegram of March 13, 1929, and Orders Nos. 337 and 338 could possibly be interpreted as withdrawals, then we must consider whether or not they comply with the requirements of the withdrawal act of June 25, 1910, U. S. C. Title 43, Sections 141-3, 36 Stat. 847-8, set out in full as Exhibit "2" annexed hereto, which act makes it imperative that a withdrawal, under this Act of June 25, 1910, must contain five elements, as follows:

1. The withdrawal must be of a temporary nature.
2. The lands withdrawn must be from settlement, location, sale or entry.
3. The lands withdrawn must be for "water power sites, irrigation, classification of lands, or other public purposes."
4. The lands to be withdrawn must be described with certainty and the purpose for which the lands are withdrawn must be specified in the order of withdrawal.
5. Such withdrawals must be reported to Congress by the Secretary of the Interior, "at the beginning of its next regular session after the date of withdrawal."

These orders did not contain any one of these five elements, and consequently, if called withdrawals, they are void as they do not comply with the Act of June 25, 1910. They are not temporary in nature because the language used in Orders Nos. 337 and 338 could not be inferred as being of a temporary nature. The word "temporary" or any other words which we can infer as being of a temporary nature, are not used in the entire Orders Nos. 337 and 338 or in the telegram to the Registers of the local Land Offices. In fact the telegram says that no permits will issue after March 12, 1929. It does not use the words "until further notice." The orders Nos. 337 and 338 use similar language.

Second, these orders do not withdraw lands from settlement, location, sale or entry. When the word "settlement" is used it means a man settling on the lands for the purpose of acquiring the right to patent under the homestead or desert land law. Chotard *vs.* Pope, 12 Wheat. 586, 6 L. Ed. 737. Also U. S. *vs.* Schurz, 102 U. S. 378, 26 L. Ed. 167. When the word "location" is used, it means the locating of lands for mineral purposes, for instance, and later acquiring patent under the placer and lode claim mining laws, Richmond Mining Co. *vs.* Rose, 114 U. S. 576, 29 L. Ed. 273. Gird *vs.* California Oil Co., 60 Fed. 532. When the word "sale" is used, it means that the lands are bought from the Government at so much per acre under the Isolated Tract laws, for instance. When the word "entry" is used, it means a homestead entry under the various homestead laws or a desert land entry or a mining entry under the old mining law. Hoglund *vs.* Lane, 244 U. S. 174. The issuance of permits does not contain any of these elements because settlement, location, sale or entry, suggests the parting of title by the Government to the lands settled, located, sold or entered, and in issuing a prospecting permit the Government not only constantly maintains title to the land but during the life of the permit and the life of the lease when issued, if a commercial discovery is made, it exercises a complete control of the operation of these lands and shares in the minerals mined under Section 14 of the Act, West *vs.* Alling, 58 App. D. C.

329. Fourth, the purpose is not stated nor is any land described in these withdrawals. The Act of June 25, 1910, contemplated a legal purpose and the creation of a policy by the Secretary of the Interior is not a legal purpose because the Constitution of the United States, Article 4, Section 3 (2), vested Congress with the power to create such policies by duly enacted legislation which it did in the passage of this specific Oil Leasing Act of February 25, 1920 (41 Stat. 437).

It does not comply with the fifth element because these Orders which are now submitted as withdrawals were not reported to Congress by the Secretary of the Interior at its next regular session.

Although the Court of Appeals in its majority decision (R. p. 25), holds that the acts of the Secretary of the Interior constituted a withdrawal of the public lands of the United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, the terms of the Act of June 25, 1910, have not been complied with in that no report of such withdrawal has been submitted to Congress.

The land applied for by petitioner is situated in Eddy County, in the State of New Mexico. The report of the respondent Secretary of the Interior to Congress for the years 1929 and 1930 do not show any withdrawals of oil lands in the State of New Mexico under the Act of June 25, 1910. (36 Stat. 847-8), or otherwise. No withdrawals were reported in the years 1929 and 1930

In other words, during 1929 when Orders Nos. 337 and 338 were promulgated which the majority opinion of the Court of Appeals of the District of Columbia construes to be a withdrawal, no additional acres of petroleum public lands were included in the reports to Congress as withdrawn under the Act of June 25, 1910. The same is true insofar as the States of California, Colorado, Montana and Utah are concerned.

The above conclusively shows that the Secretary of the Interior did not construe his acts and Orders Nos. 337 and 338 as withdrawals under the Act of Congress of June 25, 1910 (36 Stat. 847-8).

These 1929 and 1930 reports which do not include reference to the discontinuance of the granting of prospecting permits for oil and gas constitute a construction placed by the Department on the Act of June 25, 1910, which is persuasive upon the courts. These orders do not comply with any of the requirements under the withdrawal Act. See dissenting Opinion by Justice Van Orsdel, of the Court of Appeals of the District of Columbia (R. p. 34), and the Opinion of Justice Bailey on the question as to whether the Orders Nos. 337 and 338 of the Secretary of the Interior constituted a withdrawal of the public lands from prospecting for oil and gas (R. pp. 20-22), and Opinion of Justice Siddons.

UNITED STATES v. MIDWEST OIL CO., 236 U. S. 459, AND OTHER CASES.

Claim is made that if the Secretary did not possess the kind of discretion which he has exercised in these cases by virtue of the Oil Leasing Act, that the President's statement to the press, the telegram of March 13, 1929, to the local Land Offices and the Secretary's Orders Nos. 337 and 338, are not withdrawals, under the withdrawal Act of June 25, 1910, then he has a right to consider them as withdrawals by virtue of the case of United States *vs.* Midwest Oil Co., 236 U. S. 459.

Consideration of the Midwest Case shows that in 1909, President Taft was urged by the then Secretary of the Interior to make withdrawals of two tracts of lands in Wyoming and California in order to prevent the alienation of these lands, which were considered as having potential petroleum value, from being located under the old placer mining laws. President Taft withdrew these lands but he doubted his legal right to do so and in a message to Congress recommended legislation giving the President authority to make such withdrawals and validating these withdrawals of 1909. Congress refused to validate these withdrawals but instead, passed the withdrawal Act of June 25, 1910, actually limiting and circumscribing the authority of the President to make withdrawals. See Exhibit "2." The Midwest Co. entered

upon lands embraced in the withdrawal of 1909 after the lands were withdrawn. When the case reached this Honorable Court it had the question before it merely as to the 1909 withdrawals made prior to the passage of the withdrawal Act of June 25, 1910. This Court held that these withdrawals were valid in the absence of legislation, that it established a law by acquiescence in the absence of a specific Statute. But since the withdrawals considered in the Midwest case were made, Congress had spoken by the passage of the Act of June 25, 1910, and limited the power of the President to make such withdrawals, something which Congress had not done in 1909 when the withdrawals referred to in the Midwest case were made; therefore, any withdrawals made after June 25, 1910, must conform to that Act.

This has been the interpretation placed on the Act of June 25, 1909, by this Honorable Court in the majority opinion in the Midwest case, wherein this Court after reviewing the legislative history of the Act states:

> "The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice and the decisions of the Courts, reported that the President already had a general power of withdrawal, and recommended the passage of the pending bill, *inasmuch as it operated to restrict the greater power already possessed.* Sen. Rep. 171 (61st Congress, 2nd Session.)" (Italics ours).

and the dissenting opinion in the *Midwest* case states that:

> ". . . only restricted authority for the future was granted in the Act of June 25, 1910."

Similarly, Departmental decisions hold that the act was intended as a limitation of the authority of the President and was not a grant of greater power. Thus, in *Utah* vs. *Lichliter* et al., 50 Land Decisions, 231, after discussing the power exercised by the President prior to the June 25, 1910, Act, held:

> "The Act of June 25, 1910 (36 Stat. 847), pursuant to which the land now involved was withdrawn, was formal Congressional recognition of this power

and was intended as a limitation thereof rather than a grant of greater authority." Citing U. S. *vs.* Midwest Oil Co., supra. (Italics ours).

Your honors' attention is called to the fact that in the very lands embraced in the 1909 withdrawals, permits under Section 13 of the Oil Leasing Act have been issued both in Wyoming and California and some of these permits have ripened into leases. When the Oil Leasing Act was passed the question arose as to whether or not the existence of these 1909 withdrawals in the States of Wyoming and California, interfered with the issuance of prospecting permits and if they did, as to whether or not the Secretary of the Interior should not recommend to the President the revocation of these withdrawals in order to give full operation of the Oil Leasing Act. This question was then considered, and it was decided by the Solicitor's office of the Interior Department that the existence of these withdrawals made by President Taft in 1909 and any other withdrawals made subsequent thereto, did not in any way interfere with the issuance of prospecting permits under the Oil Leasing Act because these withdrawals only affected such entries on public lands wherein the Government would part with the title to those lands, and did not affect prospecting permits wherein the Government constantly maintains the complete ownership and control of such lands. Permits have issued and have continued to issue to this very day on lands embraced in valid withdrawals. Therefore, even if these Orders 337 and 338, are Oil withdrawals, they would not interfere with the issuance of prospecting permits because withdrawn oil lands do not bar the issuance of prospecting permits and do not interfere with the full operation of the Oil Leasing Act.

In Lockhart *vs.* Johnson, 181 U. S. 516, it was contended that the fact that Government lands were the subject of litigation before the Court of private land claims operated to withdraw these lands generally from the operation of the mining laws. In holding that the lands were not so withdrawn, this Honorable Court said:

"Public lands belonging to the United States for whose sale or disposition Congress has made provision

> by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an Executive withdrawal under such authority expressed or implied." Lockhart *vs.* Johnson, 181 U. S. 516.

As was said by this Court in Crilly *vs.* Burrows, 17 Wallace (U. S.) 167, even where there is a casus omissus on the part of Congress, the Executive cannot supply the omission.

The provisions of the Withdrawal Act requiring the Secretary of the Interior to report withdrawals to Congress bear out the contention that valid withdrawals can be made only of particular lands, and that Congress contemplated that future withdrawals should be accomplished as in the past, to-wit, by specic Executive order describing the specific public lands to be withdrawn.

In Noyes *vs.* Mantle, 127 U. S. 348-51, the Court held:

> "The statute gives locators of mining locations the exclusive right of possession and enjoyment of all the surface included within the lines of their locations so long as they comply with the law." Noyes *vs.* Mantle, 127 U. S. 348-51.

As was said by this Court in prior cases, mandamus would become valueless as a remedial writ against defaulting public servants if it is to be denied in every case where the cry "pro bono publico" is raised.

Roberts *vs.* United States, 176 U. S. 221;
Wilbur *vs.* United States ex rel. Krushnic, 280 U. S. 306.

A judicial or legal discretion governs the issuance of the writ of mandamus, and it has been held an abuse of discretion to refuse to issue the writ where a statute regulating the matter is thereby abrogated and relator has no other adequate remedy.

U. S. ex rel. McBride *vs.* Shurz, 102 U. S. 378.

Sufficient answer to the contentions of the respondent Secretary of the Interior arises upon the mere statement of

respondent's contentions, and if anything further were needed, it might be pointed out that the obligation imposed upon executive officers to see that the laws are faithfully executed does not imply any power to forbid their execution.

Kendall *vs.* United States, 12 Pet. (U. S.) 524, 612.

While mandamus is classed as a legal remedy, in determining whether the writ should issue, Courts exercise a judicial discretion on equitable principles and in accordance with well settled rules of law.

United States *vs.* Lane, 249 U. S. 367; and
Payne *vs.* United States, 50 App. D. C. 119.

The Courts may judicially notice rules and regulations of the Executive Departments.

New York Indian Case, 170 U. S. 1.

This Court has held in Dahl *vs.* Raunheim, 132 U. S. 260, that where a person has complied with all the proceedings essential for the issue of a patent for placer mining ground, he is the equitable owner of the mining ground and the Government holds the premises in trust for him to be delivered upon the payments specified. I quote from the syllabus:

> "Being entitled to a patent, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title."
>
> Dahl *vs.* Raunheim, 132 U. S. 260.

Prior to the Act of June 25, 1910 (36 Stat. 847-8), Cabinet officers sometimes made withdrawals, but in most of those cases there was prior statutory authority therefor as in Wood *vs.* Beach, 156 U. S. 548, or else subsequent statutory ratification of the withdrawal as in Wolsey *vs.* Chapman, 101 U. S. 755, or else the President of the United States acting under statutes expressly granting such power withdrew the certain specific tract of land by proclamation after the Secretary of the Interior had purported to make a withdrawal

as in the case of United States *vs.* Morrison, 240 U. S. 192, or else possession of the land was taken over and continually used by a Government department for purposes authorized by statute, so that it might be presumed that there was an appropriation of the land as where the land is used partly for a military post and partly for lighthouse purposes for a period of approximately thirty years as in the case of Wilcox *vs.* Jackson, 13 Pet. (U. S.) 498.

Even prior to the Act of June 25, 1910 (36 Stat. 847-8), supra, the Courts held that a withdrawal could be made only of particularly described lands and that failure to describe the land invalidated the withdrawal.

Lockhart *vs.* Johnson, 181 U. S. 516, supra;
United States *vs.* McGraw, 12 Fed. 449.

In the McGraw case it was held that the attempted reservation of lands for military purposes was void on the ground that "it did not describe its boundaries or limit the amount."

Statutes should be construed so as to sustain their constitutionality and a construction which raises doubtful constitutional questions must be avoided where some other construction is open.

Missouri Pacific Ry. Co. *vs.* Boone, 270 U. S. 466;
Baender *vs.* Barnett, 255 U. S. 224;
Harriman *vs.* I. C. C., 211 U. S. 407;
U. S. ex rel. Atty. Gen. *vs.* Delaware, etc., Co., 213 U. S. 366.

It is conceded that discretionary authority may be delegated by Congress to an executive officer to the extent that he may be allowed to determine in a specific case when and how the powers legislatively conferred are to be exercised, and may establish rules and regulations not contrary to the act, fixing the manner in which the requirements of statutes are to be met.

La Coste *vs.* Department of Conservation, 263 U. S. 545;
U. S. *vs.* Grimaud, 220 U. S. 506;
Willoughby, Constitutional Law, Sec. 1077, p. 1637.

Congress may also authorize an executive officer to suspend the provisions of an act under given circumstances so long as the facts which are to determine the suspension are precisely stated by the legislature and certainly ascertained by the executive, and there is nothing involving the expediency or the just operation of such legislation left to the determination of the executive officer.

Field *vs.* Clark, 143 U. S. 649;
Butterfield *vs.* Stranahan, 192 U. S. 470.

> "The suspension of a statute is a legislative act, unless based upon some condition, contingency, exigency, or state of facts, declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended."

Winslow *vs.* Fleischner, 112 Ore. 23, 228 P. 101, 34 A. L. R. 826.

It is submitted that if respondent's construction of the Leasing Act is to be upheld, Congress has attempted thereby to delegate to an administrative official the power to determine the policy of the law, to determine whether the policy shall be to develop and promote mining, or whether it shall be one of absolute inactivity. If the Leasing Act allows the Secretary to suspend it, the conditions, contingencies or exigencies under which this action may be taken are not defined in the statute, and it must therefore be held unconstitutional in so far as it attempts to confer any such authority.

Nor can the power of legislation be exercised by an executive officer under the guise of regulation. Congress cannot delegate to an administrative official the power to make regulations which cut down the rights given by statute.

U. S. *vs.* George, 228 U. S. 14.

> "Congress never delegated to . . . officials authority to make a regulation which cuts down substantially the rights given by the act itself. It is probable, perhaps certain, that Congress could not

delegate such substantive legislative power. See Field *vs.* Clark, 143 U. S. 649, 694."

Johnson *vs.* Keating, (C. C. A. 1) 17 F. (2d) 50, 52.

Petitioner reiterates that the Leasing Act cannot properly be construed to authorize the Secretary to refuse to consider applications for permits or to refuse by blanket order to issue any permits. Such construction would be directly contrary to the purposes of the Act in throwing public lands open to exploration and leasing in order to promote mining of the specified minerals; it would violate the express provisions of the Act by which Congress imposed upon the Secretary the duty of receiving and considering applications and issuing permits to qualified applicants; it would raise substantial doubt as to the constitutionality of the statute, if not render it repugnant to the constitution.

As stated by Mr. Justice Bailey in his opinion (R. p. 20):

"The Secretary cannot add to his powers by any rule or regulation made by him."

Respondent's construction must conform to the provisions of law before it is binding on the courts.

"A construction given by the . . . Department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. . . . It is not to be forgotten that ours is a Government of laws and not of men, and that the judicial department has imposed upon it by the Constitution, the solemn duty to interpret the laws in the last resort . . ."

United States *vs.* Dickson, 15 Pet. (U. S.) 141.

As equitable principles apply to a proceeding of this kind and as equity will contrive remedy to enforce a statute creating rights which cannot be adequately enforced at law (Joy *vs.* St. Louis, 138 U. S. 1; 21 Corpus Juris 198), so in the present case equitable principles dictate the issuance of the writ in order to prevent an irremediable wrong.

The title of the Leasing Act in question is: "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas, and Sodium on the Public Domain," and not an Act to Authorize Exploration for Minerals. And while the title of the Act is not a part of the statute it may properly be referred to and must be given its due share of consideration in construing a statute where there is any doubt as to the legislative intent.

United States *vs.* Fisher, 2 Cranch 202; 2 L. Ed. 304;
Church of the Holy Trinity *vs.* United States, 143 U. S. 457, 36 L. Ed. 227.

I call your Honors' attention to the fact that before the Leasing Act was passed the House of Representatives entitled the bill which later became the Leasing statute, as follows:

"A bill to authorize exploration for the disposition of coal, phosphate, oil, gas, potassium or sodium."
(H. R. 3232, 65th Congress, Second Session).

And the Senate bill on this leasing statute was:

"An Act to encourage and promote the mining of coal, phosphate, oil, gas and sodium on the public domain."
(S. 2812, 65th Congress, Second Session).

Respondent cannot, under the guise of quasi-judicial discretion lawfully assert the authority to refuse to entertain any applications for oil permits any more than a court of competent jurisdiction which is given authority to exercise its jurisdiction may refuse to entertain suits.

Rex *vs.* Habering Atte Bower, 5 B. and Ald. 691.
Hudson *vs.* Parker, 156 U. S. 277;
Ex parte Brown, 116 U. S. 401;
Primos Company *vs.* Fulton Steel Company, 254 Fed. 454.

The Leasing Act was passed to promote the exploration of the public domain for oil and gas and the respondent

Secretary of the Interior may not refuse a permit to a qualified applicant even though he concluded that the Leasing Act was unwise.

West *vs.* United States ex rel. Mosier, 261 U. S. 351, 67 L. Ed. 693.

Mandamus is the proper remedy in such a case.

Work *vs.* United States ex rel. Rives, 267 U. S. 175, 69 L. Ed. 561;

Stockley *vs.* United States, 260 U. S. 532, 67 L. Ed. 390.

A withdrawal of lands from the operation of the land laws, and the withholding of a land law from public lands, are two widely different things. A withdrawal made as prescribed by law and for purposes authorized by Congress is an execution of the law and a performance of the duties of the President and his subordinates.

United States *vs.* Midwest Oil Co., 236 U. S. 459, 59 L. Ed. 673;

Chicago, M. & St. P. Ry. Co. *vs.* United States, 244 U. S. 351, 61 L. Ed. 1184;

Northern Pacific Railroad Co. *vs.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 42 L. Ed. 596;

United States *vs.* Morrison, 240 U. S. 192, 60 L. Ed. 599;

State of Utah *vs.* Work, 55 App. D. C. 372, 6 F. (2d) 675.

On the other hand, a determination by an executive officer that a certain law ought not longer to be executed is a breach of official duty, and an attempted executive repeal of an Act of Congress. Executive officers have no such powers. They must not only execute the law as they find it, but must construe the law reasonably, and so as to give effect thereto.

Work *vs.* United States ex rel. Mosier, 261 U. S. 352, 67 L. Ed. 693;

Work *vs.* United States ex rel. McAlester-Edwards Coal Co., 262 U. S. 200, 67 L. Ed. 949;

Stockley *vs.* United States, 260 U. S. 532, 67 L. Ed. 390;

Payne *vs.* Central Pacific R. Co., 255 U. S. 228, 65 L. Ed. 598;

Lane *vs.* Hoglund, 244 U. S. 174, 61 L. Ed. 1066;

Noble *vs.* Union River Logging R. Co., 147 U. S. 165, 37 L. Ed. 123.

The Act of June 25, 1910 (36 Stat. 847-8), provides that the President may withdraw and reserve lands:

> "For water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals . . ." (Exhibit "2").

It is submitted that withdrawals for "public purposes" under the Withdrawal Act may be made only for purposes of the kind specifically enumerated in the statute; that the authority to withdraw lands for these purposes refers to governmental uses necessary for the proper discharge of executive functions and does not authorize any broad exercise of power independent of an immediately intended governmental use; and that an attempted withdrawal for the general purpose of "oil conservation" therefore does not constitute a withdrawal for a public purpose within the meaning of the act.

Applying the familiar rule of statutory construction that:

> ". . . where words particularly designating specific acts or things are followed by and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated."
>
> (Lewis' Sutherland, Statutory Construction, 2nd Ed., Sec. 422).

it must be concluded that the words "or other public purposes" in the Withdrawal Act embraces only purposes which are *ejusdem generis*.

Almost uniformly, withdrawals under the Withdrawal Act have been made for specific purposes contemplating

governmental use of the land. Other withdrawals have been made for the purpose of providing military reservations (47 Land Decisions 143), Indian reservations (49 Land Decisions 592), water-power sites, reclamation projects (48 Land Decisions 85), for the purpose of permitting a resurvey of the lands (49 Land Decisions 597), in aid of proposed legislation to extend the boundaries of a national park (48 Land Decisions 279), in order to determine whether lands should be classified as mineral in character and therefore not subject to entry under the homestead laws (48 Land Decisions 283) and for other purposes.

That the Withdrawal Act did not authorize withdrawals except for immediately intended governmental use is supported by Spalding *vs.* Chandler, 160 U. S. 394. The statute under construction in that case authorized the President to make such reservations of lands within a certain land district in Michigan as he should "deem necessary for public uses" (Act of March 1, 1847, 9 Stat. 146). The Supreme Court held that this Act did not empower the President to interfere with Indian reservations existing by force of a treaty, the opinion of the court stating:

> "In the absence of express authority to set apart for public uses lands already reserved and appropriated for a particular use, we cannot infer an intention in the grant of power contained in the Act of 1847 to authorize interference with the Indian Reservation, particularly when such appropriation, as the record shows, was not made for then existing public necessities but, as the letter of General Brady set out in the statement of facts shows, was merely a provision contemplated for the possibilities of the future, both with reference to a canal and the enlargements of military works, neither of which projects had then been sanctioned by Congress.
>
> Spalding *vs.* Chandler, 160 U. S. 394."

The Department of the Interior has recognized that withdrawals must be made for governmental uses necessary to the

proper exercise of executive functions. Thus, in 47 Land Decisions 362, it is stated that:

> "From an early period in the history of the government it has been the practice of the President . . . to make withdrawals and reservations of the public land for military uses and for Indian purposes or for governmental uses rendered necessary for the proper discharge of the functions committed to the executive branch of the Government in its various departments.
>
> (Grisar *vs.* McDowell, 6 Wall., 363, 381)."

A withdrawal of lands in pursuance of an alleged oil conservation policy, it is submitted, is not a purpose of the kind enumerated in the Withdrawal Act since it does not contemplate an immediate use of the land for governmental purposes. In the words of the Chandler case, supra, it "was merely a provision contemplated for the possibilities of the future" and since not sanctioned by Congress, is invalid.

The construction of the Withdrawal Act must be strained if a withdrawal for the purpose of preventing exploration of public lands at the present time and reserving them for exploration in the future is held to be a "public purpose" within the meaning of the act.

Where the President is exercising a power not expressly or impliedly conferred upon him by the Constitution, but which has been delegated to him by Congress, the power must be personally exercised. United States *vs.* Benner, Baldwin, 24 Fed. Cas. No. 14568; 7 Op. Att. Gen. 453, 475.

Where the President is required by statute to exercise discretion, or to act judicially, he cannot delegate such authority to another, not even a cabinet officer. Truitt *vs.* United States, 38 Court of Claims 398; Mechem, Public Officers, Sec. 567, 39 Cyc. 703.

Any authority for any executive withdrawal or withholding from disposal of lands which Congress has made subject to disposition, must be derived from statutes expressly con-

ferring such authority, or from Congressional acquiescence.

U. S. *vs.* Midwest Oil Co., 236 U. S. 459;
Burfenning *vs.* Chicago, etc., R. Co., 163 U. S. 321;
U. S. *vs.* Tichenor, 12 Fed. 415, 422;
Grisar *vs.* McDowell, 6 Wall. 363;
Re Fort Boise Hay Reservation, 6 Land Decisions 16;
17 Opinions Attorney General 160.

As to the question of withdrawals in this case at bar: 1. No legal withdrawals were ever made by proclamation or otherwise. 2. If these so-called orders could possibly be interpreted as withdrawals, they are invalid because they do not comply with the withdrawal Act of June 25, 1910 (36 Stat. 847-8). 3. The Midwest decision does not apply to these cases because the withdrawals referred to in that decision were made prior to the Act of June 25, 1910. 4. Even if we admit for the purpose of this case that these Orders are withdrawals under the Midwest decision, and also under the Act of June 25, 1910, they do not affect the issuance of prospecting permits, as withdrawals of any kind do not interfere with the full operation of the Oil Leasing Act. Therefore, the inevitable conclusion is that the Opinions of Justices Bailey and Siddons, respectively, of the trial court in the Supreme Court of the District of Columbia, in granting a Writ of Mandamus on the Petition filed by petitioner an other petitioners and the dissenting opinion of Justice Van Orsdel of the Court of Appeals, is sound in law and in principle and should stand, and that the majority decision of the District Court of Appeals in this case at bar should be reversed, for the various reasons given and the various authorities submitted in support thereof.

CONCLUSION.

In conclusion it is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, in the construction of the U. S. Constitution, Article 4, Section 3 (2) and the Fifth Amendment and the Leasing Act of Congress of February 25, 1920,

in order that petitioner's application for oil and gas prospecting permit under the said Leasing Act of February 25, 1920 (41 Stat. 437), may be considered on its merits and permit issued thereon according to law, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the majority decision of two to one of the Court of Appeals of the District of Columbia, and finally reverse it, and order ultimate final judgment to be entered in this case in accordance with the decisions of Justices Van Orsdel, Bailey and Siddons, of the District of Columbia judiciary on the matter involved.

Respectfully submitted,

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EXHIBIT "1"

ORDER NO. 338.

UNITED STATES,
DEPARTMENT OF THE INTERIOR,

Washington, March 20, 1929.

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public inteest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing

before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights or question of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy, otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields where a claim of drainage is made. The special committee will consider the

question of drainage only when incidentally involved in individual permits before it for consideration

13. Permits issued and outstanding in Executive Order Indian Reservations under the Act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.

EXHIBIT "2."

Said Act of June 25, 1910, 36 Stat. 847, U. S. Code, Title 43, Section 141, provides:

> "Section 141. Withdrawal and reservation of lands for water-power sites or other purposes.—The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." (Act of June 25, 1910, c. 421, sec. 1, Stat. 847.)

While Section 142, U. S. Code, formerly Section 2 of the Act of June 25, 1910, provides:

> "That all lands withdrawn under the provisions of this Act and the preceding Section shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same applies to metalliferous minerals: Provided, That the rights of any person, who at the date of any order of withdrawal, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as the occupant or claimant shall continue in diligent prosecution of said work. *Provided further*, That this Act shall not be construed as a recognition, abridgement,

or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June 25, 1910: *And provided further,* That there shall be excepted from the force and effect of any withdrawals made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (As amended by Act of Congress, approved August 24, 1912 (37 Stat. 497).)"

While Section 3 of said Act of June 25, 1910, now Section 143, U. S. Code, provides:

"The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (Act of June 25, 1910, c. 421, Sec. 3, 36 Stat. 848.)